HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

LAW SCHOOL. — For some time it has been proposed to build an addition to Austin Hall in order to meet the continued growth of the School, and it has now been definitely decided to extend the north wing, at a slight angle, for about seventy-five feet. In addition to the basement there will be five floors in the extension. The southern part of the lower four of these will be occupied by the new stack, which will have space for about two hundred and forty thousand volumes; the remainder of these four floors will contain eighteen desks and fourteen rooms for Professors, the Librarian's room, a room for cataloguing, and two delivery desks. Two lecture rooms will occupy the top floor, one about the size of the present North room, the other somewhat smaller than the East and West rooms. The main building will remain practically unaltered except that the space now occupied by the office and stack will be added to the reading room, thus giving about one hundred additional seats. A turret will mark the junction of the extension and the main building on the east, and an entrance on the west will lead to stairs connecting with the new lecture rooms. Work will at once be begun upon these alterations, which are expected to be completed in about one year.

THE RIGHTS OF CREDITORS OF A CORPORATION AGAINST A TRANSFEREE OF UNPAID STOCK. — It has been recently held that a purchaser of stock purporting to be fully paid, who has notice that it is not in fact fully

paid, is primarily liable to creditors of the corporation for the amount remaining unpaid. *Foote* v. *Illinois, etc., Bank*, 62 N. E. Rep. 834 (Ill.). The subject of stockholders' liability is covered at least partially by statute in Illinois, and the court in the principal case was chiefly concerned in determining whether, as between the original subscriber and his transferee, the latter was primarily liable. See 1 STARR & CURTIS, Ann. Ill. St., 2d. ed., 1896, c. 32, §§ 8, 25. The result of the principal case, however, in holding the transferee liable, is generally followed even in the absence of a statute. *Wishard* v. *Hansen*, 99 Iowa, 307; 1 COOK, STOCK & STOCKHOLDERS, 3d ed., § 49. It is also generally held that a *bona fide* purchaser of stock purporting on its face to be paid up is not liable. *Brant* v. *Ehlen*, 59 Md. 1; *Foreman* v. *Bigelow*, 4 Cliff. (U. S. Circ. Ct.) 508; see *In re British, etc., Co.*, 7 Ch. D. 533, s. c. *sub nom. Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004.

When the subscriber is still in debt to the corporation on his subscription, obviously a transferee with notice should be held liable to creditors for the amount unpaid, for he stands in the position of his transferrer by the tacit agreement of the parties. The creditor, therefore, is simply having the corporation's right enforced. See *Webster* v. *Upton*, 91 U. S. 65. Where, however, stock purporting to be paid up is issued in payment for property at an excessive valuation, or is issued to existing stockholders as a bonus, the question is more difficult. By the terms of his subscription the subscriber is not liable to the corporation at all. It is difficult to see, therefore, how any right which the creditor may have against him or his transferee can be worked out through the corporation. The doctrine generally advanced is the well-known and much criticised "trust fund" theory. See 25 AM. L. REV. 749. It does not seem to follow necessarily from this doctrine that the transferee is liable, unless it be considered that the individual stockholder, as well as the corporation, is in some sense a trustee. Even as regards the original subscriber, it is very difficult to point out what *res* the corporation holds in trust for the creditor, since by the terms of the contract of subscription the subscriber owes the corporation nothing, and it is even more difficult to make the stockholder a trustee. A more acceptable theory as to the subscriber's liability is that advanced in *Hospes* v. *Northwestern, etc., Co.*, 48 Minn. 174. It is there suggested that the true ground is fraud, in the nature of deceit: the fraud consisting in the issue of stock purporting to be fully paid up, when, in fact, it is not. A person giving credit to the corporation after such issue has either actually or presumably acted in reliance upon the representation, and should be allowed to recover by a bill in equity, analogous to an action at law for deceit. How a transferee can be held on this theory, however, it is difficult to see, since he has been guilty of no misrepresentation. One writer has boldly expressed the opinion that, since the development of the law in regard to this subject is really a process of judicial legislation, the courts really reach the result that commercial exigencies demand, and expand or contract the "trust fund" theory to suit the occasion, establishing a new status — that of stockholder — and that therefore they refuse to allow the creditors to be prejudiced by any agreement that stock shall not be paid up. 34 AM. L. REG., N. S. 448.

It would seem that not without a strain can the creditor's equity be made to attach to the stock, except upon the latter theory, and that unless it does attach, the transferee probably cannot be held. While

the fraud theory may account for the liability of the original subscriber, the broader theory is perhaps the only one which satisfactorily explains the liability of the transferee.

THE RIGHTS OF MUNICIPALITIES AS AFFECTED BY THE STATUTE OF LIMITATIONS. — The maxim "*Nullum tempus occurrit regi*" has been adopted from England into the law of the United States. Neither the Federal government nor that of any sovereign state can be debarred by mere lapse of time from asserting its rights. *United States* v. *Hoar*, 2 Mason (U. S. Circ. Ct.) 311. Under a representative government a far-seeing public policy demands that public rights shall not be lost through the negligence or misfeasance of public servants. The question often arises, however, as to whether a municipality should be exempt from the operation of the statute. It seems that the proper answer must depend ultimately on how far a municipality is part of the state machinery — a political and administrative division — and how far a complete corporate entity with distinct rights and liabilities. The answer given to this query under varying circumstances will determine whether or not the statute may run against a city. To the proposition that public rights in and to highways, streets, and squares dedicated to public use cannot be lost by any length of adverse possession, there is general, but not universal, assent. See *Burbank* v. *Fay*, 65 N. Y. 57, 69, 70. Even where the state, and *a fortiori* the city, is by legislation subject to the statute of limitations, the courts have held that a city does not lose these rights by the lapse of the statutory period. *Hoadley* v. *San Francisco*, 50 Cal. 265. And where judicial legislation has not accomplished this result the law-makers have themselves provided for it. See N. H. PUB. ST. 1901, c. 77, § 7; MO. REV. ST. 1889, § 6772; VERM. ST. 1894, §§ 1220 and 1223. This trend of legislative and judicial opinion is well brought out by a recent Minnesota case. The court, acknowledging that the rule followed was "at variance with the overwhelming weight of authority and reason," felt reluctantly constrained by previous decisions to hold that the defendant by twenty years' adverse possession had acquired title to part of a public street. *City of Hastings* v. *Gillitt*, 88 N. W. Rep. 987. The legislature has accomplished what the court felt unable to do; first, by enacting that statutory limitations shall apply to the state, and then providing that no occupant of any public street or highway shall acquire title by reason of such occupancy. See 2 MINN. ST. § 5142; MINN. LAWS, 1899, c. 65. But the statutes not being retroactive did not govern the principal case.

On the other hand, it is general law that title to land held by a municipality for its private uses may be lost by the statutory period of adverse possession. *Evans* v. *Erie Co.*, 66 Pa. St. 222. But in several jurisdictions time always runs against a city, irrespective of circumstances. *Wheeling* v. *Campbell*, 12 W. Va. 36.

It seems that the distinction noted above is not only reasonable, but in accord with other analogies. Unquestionably municipal corporations have dual characters, public and private, in accordance with which both their power to act and their liability for damage inflicted vary. It has been argued that the same reasons for applying the maxim of "*Nullum tempus*" to the sovereign do not hold in the case of a city. The city is more compact, it is said; encroachments on public rights cannot so readily escape detection, and there are officers to prevent just such acts.